First Principles.

NATIONAL SECURITY AND CIVIL LIBERTIES

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In The News

January 7, 1976 "Authoritative sources" disclosed that the CIA is providing $6 million to Italian centrist parties, apparently in a program modeled on the 1948 effort. In spite of divergence from Moscow's line, Secretary of State Kissinger reportedly was worried about the effect Communist participation in Western European government would have on the NATO alliance. (*Washington Post*, 1/7/76, p. 1A)

January 10, 1976 The *San Diego Union* reported that an ultra-right wing group, the Secret Army Organization, carried out burglaries, bombings, threats and shootings to disrupt the anti-war movement and was led by a paid FBI informant who swore before a 1972 grand jury that he founded the organization on orders from the FBI. The ACLU has submitted a report to the Senate Intelligence Committee which asserts that the FBI was responsible for death plots against San Diego leftists.

January 11, 1976 Documents released under the Freedom of Information Act to the *Washington Star* revealed that the police departments in the D.C. area had received extensive training from the CIA in "clandestine collection methodology," including safecracking, burglary, and wall replastering. The documents contained letters praising the CIA from police chiefs who had elsewhere denied any direct knowledge of the CIA liaison, as well as documentation of cover-up efforts to conceal the program from reporters and Congress. (*Washington Star*, 1/11/76, p. A1)

January 11, 1976 The CIA file concerning the death in 1954 of Dr. Frank Olson, an unwitting subject for an LSD experiment, contained numerous contradictions which CIA spokespersons declined to explain. These included statements both that those employees responsible for the experiment were reprimanded and that they were not reprimanded. Another document indicated that it was not until 1973 that drug experiments on unwitting Americans were prohibited.

January 17, 1976 Testimony before the House Committee on Intelligence confirmed that the CIA's "covert media projects" overseas have resulted in the "contamination" of press coverage in the United States. A CIA coordinating committee warns a few U.S. officials of which stories are CIA fabrications, but the U.S. public has no way of knowing. (*Washington Post*, 1/17/76, p. A1)

January 20, 1976 Justice Department attorneys concluded that CIA officials involved in assassination plots against foreign leaders could not be prosecuted under existing U.S. law. Neither federal conspiracy nor D.C. murder statutes were considered appropriate. The CIA has now agreed to review for release its materials on assassinations given to the Rockefeller Commission. These documents are the subject of an FOIA lawsuit filed by the ACLU. Still pending are decisions as to whether to issue indictments for the mail opening program, wiretap violations, burglary, and perjury. (*New York Times*, 1/21/76, p. A1)

January 25, 1976 Former FBI intelligence officials stated that they did not believe that J. Edgar Hoover would have recommended the wiretapping of 17 government officials and journalists, including Morton Halperin. Their statements and Nixon's sealed testimony contradict Secretary of State Kissinger's claim that Hoover selected "potential tap victims."

January 30, 1976 The *New York Times* received documents under the Freedom of Information Act which confirmed the allegation of former *Times* reporter Wayne Phillips that the CIA had attempted to recruit him in 1952. In response to a 1973 *Times* inquiry whether *Times* personnel were involved with the agency, then-DCI William Colby had assured the paper none had. (*New York Times*, 1/31/76, p. 28)

January 28, 1976 The ACLU has requested that Secretary of State Henry Kissinger publicly withdraw the requirement that members of officially-sponsored performing arts groups touring abroad submit before publication any writings about the tours to the State Department for "agreement." ACLU Legal Director Melvin Wulf called the requirement an infringement of the First Amendment guarantee of free speech.

It is at all times necessary, and more particularly so during the progress of a revolution and until right ideas confirm themselves by habit, that we frequently refresh our patriotism by reference to first principles.

THOMAS PAINE

In The Courts

January 5, 1976 *U.S. v. Woolbright*, #75-615M (S.D. Ca.) The CIA refused to provide defendant with materials relating to the documents stolen from the Summa Corp. office of Howard Hughes in the burglary which exposed the CIA domestic cover for the Glomar Explorer. The CIA offered no explanation.

January 7, 1976 *Nixon v. Administrator of General Services*, Civil Action #74-1852 (D.D.C.) Held that the legislation by which Congress gave possession of the Nixon papers to the General Services Administration is not unconstitutional on its face; declined to hold that an ex-President may not assert Executive Privilege but stated that even assuming arguendo that he could, "such a claim carries much less weight than a claim asserted by the incumbent himself." Despite the fact that the Nixon papers include many classified documents the opinion states that "this case presents no problem concerning secret information pertaining to national security, and thus, like the Supreme Court in *United States v. Nixon*, we express no view on the relevance to that problem of anything in this opinion."

January 13, 1976 *Meeropol v. Levi*, Civ. Action #75-1121 (D.D.C.) In response to allegations by Michael and Robert Meeropol in their FOIA lawsuit that the government was withholding documents and misrepresenting its filing system, Judge June L. Green ordered that the government turn over for in camera inspection all remaining documents in the Rosenberg spy case.

January 16, 1976 *U.S. v. Bechtel Corporation*, Civil No. C-76-99 (N.D. Ca.) The Justice Department brought charges against Bechtel construction company and its affiliates for conspiring to boycott individuals and companies on the Arab League's anti-Israeli blacklist. According to press reports the State Department had objected to the suit on foreign policy grounds.

January 26, 1976 *Zweibon v. Mitchell*, 516 F.2d 594 (D.D.C. 1975), petition for certiorari filed by plaintiffs, Supreme Court No. 75-1056. Case had been remanded to District Court; plaintiffs request a determination of whether the statutory damages for illegal wiretapping are to be "unavailable if the defendants establish a subjective good faith belief, reasonably held, in the lawfulness of their conduct." Defendants Mitchell and FBI employees also filed petitions, asking that *Zweibon* petition be denied, but, if granted, a determination be made whether the JDL wiretap was in fact a constitutional national security wiretap and, as such, legal.

January 27, 1976 *Sinclair v. Kleindienst*, Civ. Action #75-1742 (D.C. Cir.) Motion for summary reversal was granted where the district court had granted motion to dismiss based on claim of good faith in connection with warrantless wiretaps (those involved in the *Keith* case) without permitting discovery.

In The Congress

January 10, 1976 The Senate Select Committee on Intelligence and the Ford administration agreed to an arrangement for joint working sessions for drawing up proposals for legislative reform of the intelligence community. While each reserved the right to disagree with the other's proposals, the alternative would appear to be the committee's drafting legislation which would be vetoed if passed or the executive's drafting legislation which would not be accepted by Congress. By contrast, the House Committee on Intelligence saw such meetings as giving the White House a chance to water down reforms to nothing. (*New York Times*, 1/11/76, p. A1)

January 19, 1976 Senator Frank Church introduced S. 2893 proposing a standing committee to oversee the intelligence community and continue the study begun by the Senate Select Committee. See the article on page 11.

January 24, 1976 The Senate Intelligence Committee voted to take sworn written testimony from former President Nixon regarding his program to topple the Allende government in Chile. The committee also agreed to send to the Justice Department testimony related to the perjury investigation of Richard Helms, in which the former CIA director denied that the U.S. supplied funds for the covert Chile operations.

In The Literature

Articles

"Prying Out the Truth," by Amanda Harris, *(MORE)*, January 1976, p. 6. The amended FOIA, government tactics to avoid implementing it, FOIA successes, and the press's neglect of its potential uses.

"Controlling the Central Intelligence Agency," by Ernest Gellhorn, former Senior Counsel to the Rockefeller Commission, *New York Times*, January 19, 1976, p. 29. Notes that virtually no new legal and administrative controls have been instituted for the control of CIA activities. Recommends that the Charter be rewritten, that the Director of Central Intelligence be insulated from White House abuses of CIA power, that congressional oversight be instituted, and the inspector general's office upgraded.

"The CIA from Beginning to End," by Garry Wills, *The New York Review*, January 22, 1976, p. 23. History of the CIA: its legacy from OSS and Britain's MI-6, its aristocratic esprit de corps, and sense of being morally above the law.

"Prosecutor as Public Enemy," by Herman Schwartz and Bruce Jackson, *Harper's*, February 1976, p. 24. Discusses abuses of the power to prosecute, especially in political cases where "prosecutors most frequently seem to lose their sense of professional responsibility."

"Nixon's Revenge," by Milton Viorst, *Harper's*, February 1976, p. 17. A discussion of S.1, now pending before Congress, which would broaden the espionage laws, create an official secrets act, subject even peaceful demonstrators to felony charges, and threaten civil liberties in many other ways.

"How I Became a Security Risk" by Vern L. Bullough, *The Nation*, Feb. 7, 1976, pp. 140-142. Under the FOIA, the author obtained his dossier and uses its information to demonstrate that the nation's security apparatus is guilty of incompetence, misrepresentation of facts, and wasting public money.

"The Clandestine Establishment," by Rep. Michael Harrington, *The Nation*, Feb. 7, 1976, pp. 138-140. The Massachusetts Congressman reviews the activities of congressional committees investigating the intelligence community, and expresses concern that attempts at reform may only produce greater secrecy and sanction covert operations.

Law Reviews

"Police Helicopter Surveillance and Other Aided Observations: The Shrinking Reasonable Expectation of Privacy" by John Jay Kornoff, 11 *California Western Law Review*, 505 (Spring '75), pp. 505-536. Kornoff argues that when used by law enforcement agencies without a warrant, helicopters and sophisticated surveillance devices are in violation of the Fourth Amendment.

Books

The CIA File, edited by Robert Borosage and John D. Marks (Grossman: New York, 1976). Papers, submitted for a Center for National Security Studies conference, by Victor Marchetti, Morton Halperin, and others about CIA operations at home and abroad. Includes a question-and-answer session between William Colby and his critics. See order blank, page 15.

FBI, by Sanford J. Ungar (Atlantic-Little Brown, March 15, 1976). Reviews the 70-year history of the FBI — its "war" on crime, deals on Capitol Hill, harassment of dissidents, "security operations" overseas, use of informants and electronic surveillance, and Watergate investigation; interviews with Kelley, Ruckelshaus, Patrick Gray, and Kleindienst.

The Assassinations: Dallas and Beyond — A Guide to Cover-Ups and Investigations, edited by Peter Dale Scott, Paul H. Hoch, and Russell Statler (Random House: New York, 1976). Primary documents raising questions about the deaths of JFK, Martin Luther King Jr., Robert Kennedy, and the shooting of George Wallace; the possibilities of cover-ups by officials and agencies; need for Congressional investigation into possible FBI-CIA roles.

Government Documents

The Modern Military Branch, National Archives, Washington, D.C. 20408 now receives copies of NSC documents as they are declassified. Lists are available (10¢ page, approx. 36 pp.) for those which have been declassified in response to FOIA requests, to mandatory review requests submitted under E.O. 11652, and for publication in the *Foreign Relations* volumes.

National Security Information: Congress's Rights

BY MORTON H. HALPERIN

For 30 years Congress has allowed the executive branch to control its right to receive and to release information which the executive branch claims must be kept secret in the interests of national defense or foreign policy. The recent efforts of the Senate and House Intelligence Committees to probe the intelligence agencies' secret programs and then to release their findings have provoked a continuing controversy.

This article first reports on how the Senate and House Intelligence Committees have handled the problem of control over information, then turns to examine the constitutional and political bases for the respective powers of the President and the Congress in this area, and finally considers various suggestions — including those incorporated in legislation proposed by the Senate and House Intelligence Committees — for regularizing the situation.

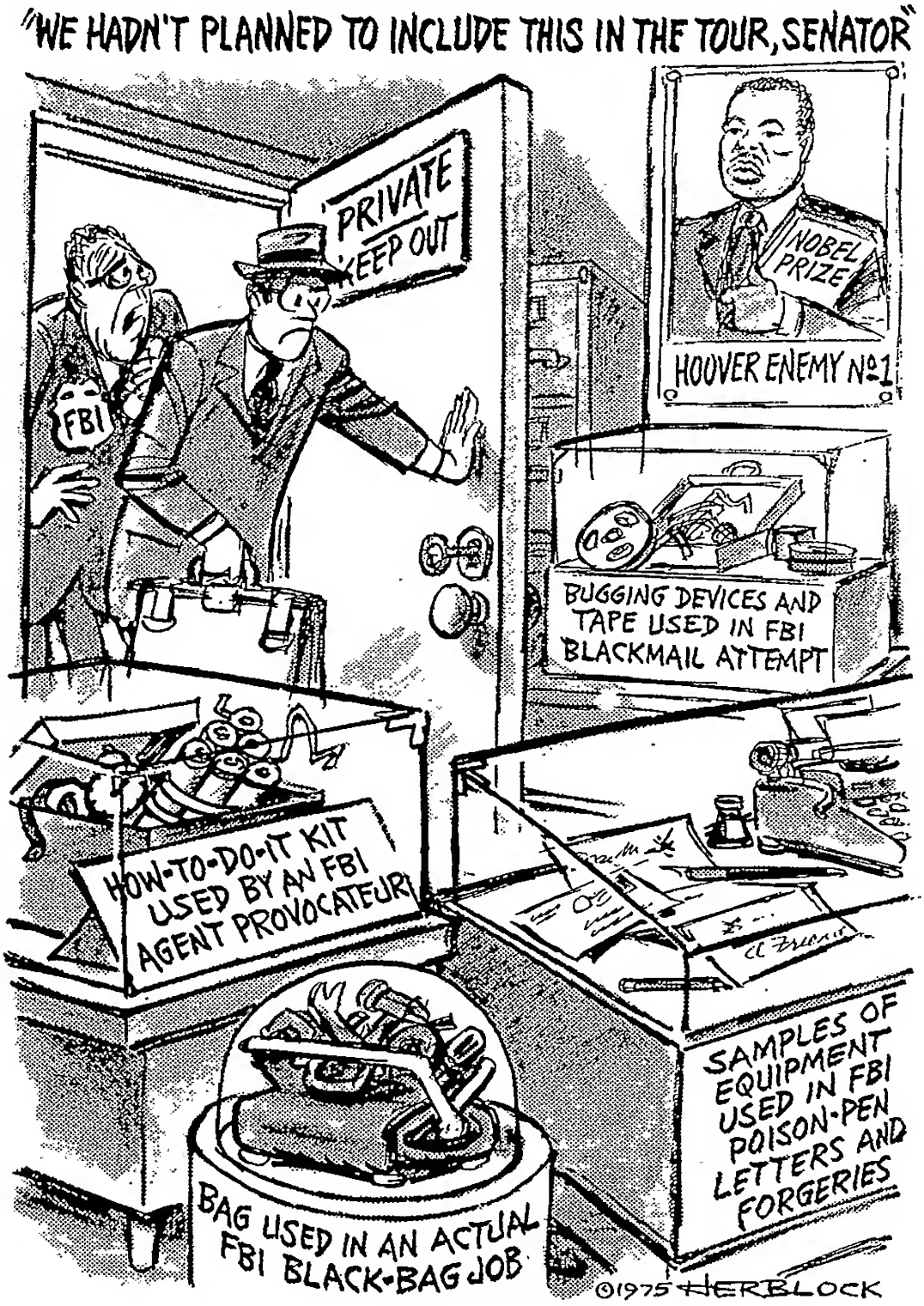
The Recent Experience

Until the past few years there did not appear to be any question that the Congress had a right of access to national security information. The executive branch consistently asserted that classification was no bar to releasing information to the members of Congress or to congressional staffers with security clearances. Documents or information were refused, but it was generally on some other ground, most often a generalized claim of "executive privilege." Congressional committees generally accepted presidential assertions that information could not be provided; where they did not, a political compromise was reached. Congress never withheld funds because of a failure to obtain information, nor did it go to court to seek to hold an official in contempt.

Another question which apparently never arose was that of Congress's right to publish information over executive branch officials' assertions that it should remain classified. Congressional staff committees would routinely negotiate with executive branch officials, but in the end agreement was reached on what should be published.

The formation of the Senate and then the House Intelligence Committees — with a mandate to probe deeply into highly sensitive secrets of the agencies — created an entirely new situation and provoked a series of confrontations over congressional rights of release.

Both committees began by demanding the right to clear their own staff members, rather than delegating this responsibility to the executive branch as committees before them had done. After some grumbling the intelligence agencies went along; the FBI did field investigations and passed the information on to the committees, which then made their own decisions about clearances.



The committees also demanded information about intelligence activities which had never before been subject to congressional committee scrutiny. This raised the question of access to the system of special clearances that exist for various intelligence activities relating to reconnaissance, communications, and covert intelligence gathering.

Intelligence agency officials found themselves in a difficult situation. When the Watergate Committee had pressed for sensitive intelligence information related to the CIA role in Watergate, CIA Director William Colby had resisted, saying that the committee had no charter authorizing it to receive sensitive intelligence information. Colby asserted that he held nothing back from his Armed Services and Appropriations oversight subcommittees; if Congress wanted to change the rules and direct him to report to other committees as well he would do so.

By establishing the Select Committees on intelligence, Congress had changed the rules, and demands for information were now backed up by an absolutely clear mandate from the Senate and the House. The agencies reacted with a variety of tactics — described in great detail in the report of the House Intelligence Committee — which were designed to stall and obfuscate. The two intelligence committees reacted in very different ways to the efforts to deny them the release of information.

Senate Committee Responses to Executive Claims of Secrecy

The Senate Intelligence Committee used the traditional method of getting information from the executive branch — it negotiated. There were extensive staff discussions and where necessary the disputes were escalated to include the committee Chairman and Vice-Chairman, Senators Frank Church and John Tower. On one or two occasions the committee resorted to the threat of a subpoena, and in the end it received most if not all of the information which the committee and its staff felt that it needed to conduct the investigation.

The big confrontations came over the committee's right to release information that it had received from the executive branch and from witnesses before the committee. This issue came to a head with the committee's report on assassinations. When President Ford threw this hot potato to the committee, he had promised it complete access to material in the executive branch and had seemed to acquiesce on the idea of a public report. The committee certainly proceeded on the assumption that its responsibilities included reporting to the public on the CIA's efforts to assassinate foreign leaders.

As the assassination report was nearing completion, officials in the executive branch began to object to public release. Their objections went beyond release of specific names or incidents to the entire concept of releasing a report which would detail the CIA's covert operating procedures and the specific efforts to assassinate foreign leaders. When the matter was taken to the President he supported his subordinates and called upon the committee not to release the report.

Negotiation was tried but only made it clear that there was no room for compromise. Saying that it would destroy the American reputation abroad, the executive branch opposed on principle any public discussion of these matters. With the exception of Vice-Chairman Tower, the committee members were equally convinced that the release of the report would not seriously damage the national security, that the public was entitled to know, and that politically the committee could not be a party to suppressing such information.

The committee analyzed its position at this point and concluded that the Senate and the country would support release. It recognized that the President might respond as it had to the House committee (discussed below) by refusing to supply any additional information, but the staff concluded that it already had the information necessary to complete its investigation. And finally, the committee concluded that from a legal and constitutional analysis the Senate had the right to release any information in its possession — even information obtained in confidence from the executive branch — and that this right had been delegated to the select committee.

When the report was completed the committee took the precaution of bringing it before the Senate in a secret session — not to ask for permission to publish the report but simply to give the Senate the chance to object. The Senate debate revolved around Senate Rule XXXVI:

> *All confidential communications made by the President of the United States to the Senate shall by the Senators and the officers of the Senate be kept secret; . . . until the Senate shall, by their resolution, take off the injunction of secrecy . . .*

No Senator suggested that the rule itself might be unconstitutional; no one argued that the Senate could not make public information it received in secret from

the President but which the President did not want released. Rather, the debate centered on whether Rule XXXVI applied and, if so, whether it had been complied with. Some argued that the rule related only to information sent to the Senate as a whole and not to information supplied to committees; such information, it was suggested, could be released by the committee alone. Others, supported by an opinion of the parliamentarian, argued that by directing the committee to submit a final report and interim reports to the Senate, the Senate had delegated to the committee the power to release information. In the end the Senate took no action and permitted the report to be released.

The committee then held its breath and waited. Nothing happened. The President made no further objection and there was no change in the pattern of relations with the executive branch. Neither did the injury to the national security which the executive committee had warned of come to pass.

The committee had confronted the same problem earlier, in its investigation of the National Security Agency. The committee believed that information about the cooperation of private cable companies with NSA — information it had obtained not only from the executive branch but also from the cable companies — should be made public. When the executive branch declined to testify in public on the program or to declassify any documents, the committee drew up its own report which Senator Church read into the record of the committee hearings.

Later the issue arose in connection with the committee's investigation of covert action. The investigation had taken the form of a series of case studies, most of which the committee felt should be kept secret. The report on Chile, however, the committee felt should be released. Much information about American actions in Chile was already in the public domain, and the government now in power in Chile would not take exception to American efforts to prevent Allende from coming to power. Predictably, the executive branch objected, but the committee decided to go ahead. It gave the intelligence agencies ample time to raise objections to specific passages and compromises were made when possible. The President was then given the text and the opportunity to object. This done, the committee went ahead and released the staff study. Again, nothing further was heard about the matter.

The Church committee reportedly plans to proceed in the same way with its final report. A draft will be shown to the executive branch, allowing ample time to object to particular passages; the President will be given an opportunity to make his views known to the committee. However, the committee will decide for itself what should be made public, release its report, and then go out of business.

House Committee Response to Executive Claims of Secrecy

The House committee's confrontations with the executive branch over its right to obtain and to release classified information can only be described as turbulent. The committee's demand for information was often put in sweeping terms, *e.g.*, all minutes of the Forty Committee over a designated period of time. Executive branch resistance was countered with a subpoena, which generally produced the requested documents with some deletions.

Unlike the Senate committee, the Pike committee conducted most of its hearings in public and pressed for the release of documents so they could be used in hearings. This procedure produced an early confrontation when the committee scheduled a hearing on the apparent failure of the intelligence community to predict the Middle East War of 1973. The committee asked for the declassification of an intelligence community assessment of its performance in the days prior to the war's outbreak. Much haggling ensued and agreement was finally reached on all but four words: "and greater communications security." This described an action by the Egyptian government that had presumably signaled impending hostilities but which had not been fully appreciated by intelligence agencies.

Chairman Pike was annoyed at the many deletions that the committee had already agreed to and was unpersuaded that the release of these four words would threaten national security. He argued that without the four words the public hearing could not convey the correct impression — that relatively clear intelligence signals had been missed. The chairman had a majority supporting him and the document was released the next morning with the controversial words left in.

The administration reacted as though its honor and virtue had been challenged. The President denounced the action and sent an ill-prepared Assistant Attorney General down to the committee to tell them that the committee had no constitutional right to release the four words and that no more material would be provided until the group gave the executive branch a veto over public release. He further demanded the return of all classified information in the committee's possession.

After some negotiation, the committee capitulated and accepted the President's conditions. As spelled out in a letter from Director of Central Intelligence William Colby to Chairman Pike they provided that documents, with deletions explained, would be loaned to the committee and

with the understanding that there will be no public disclosure of this classified material (nor of testimony, depositions or interviews concerning it) without a reasonable opportunity for us to consult with respect to it. In the event of disagreement, the matter will be referred to the President. If the President then certifies in writing that the disclosure of the material would be detrimental to the national security of the United States, the matter will not be disclosed by the Committee, except that the Committee would reserve its right to submit the matter to judicial determination.

After sharp debate, the committee voted to accept material under these restrictions. Chairman Pike, who pressed for acceptance, argued that given the tight time limits under which the committee was operating (this was early November and the final report was due on January 31, 1976) there was no choice. Any effort to hold executive officials in contempt would require legal proceedings which would extend far beyond the life of the committee. The resolution accepting the terms specifically stated that they should not be taken as a precedent for future committees.

The committee members' sense that they were victims of extortion was increased when it was later discovered that the information revealed in the famous four words had already been leaked by an executive branch official and published in a book on Henry Kissinger by Bernard and Marvin Kalb. Here is how the Kalbs described the same episode:

Finally, from a secret U.S. base in southern Iran, the National Security Agency, which specializes in electronic intelligence, picked up signals indicating that the Egyptians had set up a vastly more complicated field communications network than mere "maneuvers" warranted.

This episode and others were recounted in bitter detail in the draft of the committee's final report. When it was submitted to the executive branch, intelligence officials predictably objected to many passages and invoked the agreement with the committee to block release. Not so predictably, the committee decided that the agreement — which it had scrupulously followed up to this point — did not apply to its final report to the House of Representatives. Despite objections from the executive branch, the committee went ahead with its plans to publish the report, and someone provided a copy to the *New York Times*.

At this point, on a technicality, the committee was forced to go before the House Rules Committee for permission to publish the final report. The Rules Committee proceeded to amend the resolution to provide that the report could not be published

until the report has been certified by the President as not containing information which would adversely affect the intelligence activities of the CIA in foreign countries or the intelligence activities in foreign countries of any other department or agency of the federal government.

The debate which followed on the House floor on January 29, 1976 was as poorly focused as the Senate debate on the assassination report had been some two months earlier. Again, no member was heard to doubt that the House could constitutionally release information which the President asserted was classified and should not be released. One issue was whether members, without having the opportunity to read it themselves, would vote to release a document which the President asserted should not be released and which admittedly contained information that the executive branch said was classified. But it was the earlier agreement that was more important to most of those participating in the debate, including the ranking Republican on the Select Intelligence Committee, Robert McClory, who argued that releasing the report would violate the committee's agreement with the President and that the House should not approve such a step. This reasoning carried the day and the House voted 246 to 124 against release of the report.

The Constitutional Issue

The debates between the executive branch and the Senate and House Intelligence Committees dramatized the differences in their views on Congress' right to demand national security information and its right to pass that information to the public.

The executive branch appears to begin with the premise that national security information belongs to the President as commander in chief and representative of the nation in foreign policy. The President can and will "loan" such information to the Congress, but the President retains the right to decide what should be made public. Most members of Congress, however, seem to agree that Congress has a constitutional right to information related to foreign policy and national defense, that the executive branch must supply requested information, and that Congress has the right to determine what information should be

made public.

Here the constitutional issue is examined briefly.

There are three strands of argument which must be brought together in determining the powers of Congress and the President in this area. The first deals with the general question of separation of powers and Congress' right to regulate the activities of the executive branch, the second relates to the President's national security powers, and the third concerns Congress' right to information.

Separation of Powers

The Constitution provides that Congress shall have the power

> *to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this constitution in the Government of the United States, or in any Department or Officer thereof.*

The Supreme Court has generally interpreted this broadly. With only two exceptions, Congress' power extends to regulating the way in which the executive branch shall be organized and function. The first exception is that a power specifically granted to the President in the Constitution may not be legislated away by Congress (for example, Congress could not prevent the President from recommending legislation). The second limit on congressional power over the executive stems from the notion that there are certain activities and powers that are necessary if the executive is to function, and Congress cannot limit the President in the exercise of these necessary functions.

Only twice in the history of the Republic has the Supreme Court held a statute unconstitutional on grounds that Congress had exceeded its power to limit the actions of the President. The first case involved a congressional effort after the Civil War to limit the President's ability to grant pardons. In *U.S. v. Klein*, 13 Wall 128(1871), the Court held that the pardon power of the President was complete and could not be limited by legislation. The second case involved a dispute over whether the President had the power to remove executive branch officials, or whether Congress could require the advice and consent of the Senate before an official could be removed from office. The Court held that the power to remove executive officials was a necessary part of the executive power; however, this decision has subsequently been restricted to those performing purely "executive" functions. *Myers v. U.S.*, 272 U.S. 52 (1926); *Humphreys Ex'r v. U.S.*, 295 U.S. 602 (1935).

Following this line of reasoning on separation of powers, Congress's demands to obtain and to release national security information would be unconstitutional only if it interfered with an activity of the executive branch which the Constitution specifically granted to the President or which was necessary for the performance of either the executive function or a specifically enumerated function. The Constitution grants the President no specific power to withhold information from either the Congress or the public, or to control the public release of information. Nor has the case been made that such control is essential to an executive function.

National Security Powers

The claim of presidential supremacy in the area of national security generally rests on the assertion that the powers of the President in the fields of foreign policy and national defense are greater than in domestic areas and that the ability of Congress to intervene is therefore significantly reduced. The President's rights as "commander-in-chief" and "sole organ of the nation in foreign affairs" are said to include inherent powers which cannot be controlled by the Congress.

But the plain text of the Constitution does not indicate such an intention on the part of the framers. The Constitution clearly requires a sharing of foreign policy powers. Thus, while the Constitution designates the President as commander-in-chief and authorizes him to receive Ambassadors, he may appoint Ambassadors and make treaties only with the consent of the Senate. The Congress as a whole is authorized to appropriate funds for the Army and Navy and legislate rules for their operations. Congress is also empowered to regulate interstate commerce and to declare war.

The Supreme Court has yet to find inherent national security powers in the presidency which are beyond the power of Congress to regulate. Indeed, most of the cases generally cited as support for the concept of inherent powers in fact turned on a court finding that Congress had authorized the action taken. For example, while *U.S. v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936) contains ample dicta on the President's powers, it held simply that if it chose to do so, Congress could delegate to the executive broad powers in the field of foreign affairs. Where the court has refused to sanction presidential action in a particular field it has generally been because Congress had not authorized such action or had previously legislated for other responses in that field. In his famous concurring opinion in the steel seizure case, Justice Jackson pointed out that the power of the President is at its lowest ebb in areas where Congress has already passed legislation, even in fields clearly involving the survival of the nation. *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579 (1952). Never has the court declared an act of Congress unconstitutional because it encroached on the defense or foreign policy powers of the President.

Despite their rhetoric, recent Presidents have ac-

cepted congressional limits on their national security powers in such areas as war powers and ending of the bombing of Cambodia without mounting a court challenge.

Congress' Right to Information

It is in the dispute over the control of information that Presidents have made their most specific claims to inherent powers free of the control of the courts and the Congress.

Much confusion has flowed from the ways the term "executive privilege" has been used to defend a variety of claims for presidential power to withhold information. The term has been variously applied to (1) the President's right to receive advice in confidence from his subordinates; (2) the President's right to control the release of national security information; and (3) a generalized presidential right to control all information in the executive branch for reasons including, but not limited to, advice and national security.

Recently an increasingly sharp distinction has been made between the "advice" privilege (sometimes referred to as the executive privilege) and the national security or state secrets privilege.

In *U.S. v. Nixon*, 418 U.S. 683 (1974) the Supreme Court held for the first time that there was a constitutionally based presidential advice privilege — the ability to receive advice in confidence was held necessary for the performance of the executive function. At the same time the court held that the privilege was not absolute and could be overcome, as in the Nixon case, by the strong showing of need for the information for a criminal prosecution. The court noted that national security information had not been involved and, although it quoted with approval its earlier opinion in *Reynolds* (see below), it expressed no position on national security information.

Following the decision in *Nixon*, lower courts have held that the presidential advice privilege could also be overcome in civil litigation by a strong enough showing of need. Of more direct relevance to the concerns of this article, the Court of Appeals for the District of Columbia had earlier found that a congressional committee could overcome the presidential advice privilege by a strong enough showing of need (the court held, however, that the Senate Watergate Committee had not made a sufficient showing). *Senate Select Committee v. Nixon*, 498 F.2d 725 (D.C. Cir. 1974).

No court has yet ruled directly on the question of Congress' right to compel the executive branch to provide national security information. The Supreme Court however has dealt, both in connection with civil litigation and in its interpretation of the Freedom of Information Act's exemption for national security information, with what is often referred to in the judicial context as the state secrets privilege.

The leading state secrets case is *U.S. v. Reynolds*, 345 U.S. 1 (1953), where the court held that it was not enough for the executive branch simply to claim that the release of certain information would injure the national security. Rather, to decide if the privilege were properly invoked, the court would have to satisfy itself that damage would in fact result from the release of the information. In *Reynolds* the court held that the government had met its burden of proof by affidavit and that review of the material by the court was unnecessary. In subsequent cases lower courts have examined material *in camera* (privately in the judge's chambers) to rule on claims of the state secrets privilege.

Although Congress has passed no legislation expressly requiring the executive to provide national security information to the Congress, in the Freedom of Information Act it has directed that such information must be released to any person requesting it, unless the information is properly classified pursuant to the criteria of an executive order (see *First Principles*, November, 1975).

In *E.P.A. v. Mink*, 410 U.S. 73 (1973), the Supreme Court provided its only interpretation of this FOIA exemption as it stood prior to the 1974 amendments. The Court held that Congress had not intended for the courts to examine the propriety of the classification, but went on to say that:

> *Congress could certainly have provided that the Executive Branch adopt new procedures — subject only to whatever limitations the Executive privilege may be held to impose upon such congressional ordering. Cf.* United States v. Reynolds, *345 U.S. 1 (1953).*

Since it follows that Congress' power to require the release of information to the general public cannot be greater than its power to require that information be given to the Congress itself, the Court in its unanimous opinion seems to be saying that Congress can in fact write its own standards for the release of national security information to the public and, *a fortiori*, to the Congress.

The uncertainty comes with the added phrase "subject only to whatever limitations the Executive privilege may be held to impose upon such congressional ordering." In a subsequent opinion dealing with the Freedom of Information Act, Justice White, the author of the *Mink* opinion, has used the term "the Executive privilege" to refer exclusively to executive branch advice privilege. If that was the intended meaning of the phrase in *Mink*, it would mean that Congress could set any standard it chose for national security information, subject only to the caveat that it could not require the release of advice contained in the same document. If the court had in mind the more generic meaning of the phrase, it leaves open the question of whether the court would put any limits on the power of Congress to require the public release or the release to the Congress of national security information.

Future Options: Toward a Constitutional Balance

Both the Senate and the House have rules dealing explicitly with the question of Congress' right to release information received in secret from the President. The House rule is similar to the Senate rule quoted above — both permit the decision to publish information. The House rule can be traced back to the first session of Congress, when the House first adopted a rule requiring that any information received in confidence from the President should remain secret until the President advised the House that it could be released, but later in the session the House amended the rule to provide that the House itself could decide to release the information. The constitutional provision that each house keep a journal of its proceedings and shall publish the journal "excepting such Parts as may in their Judgment require Secrecy," appears to leave little doubt as to the constitutional right of each House to publish information in its possession. Certainly the courts are unlikely to restrain the Congress.

The difficult questions turn upon the processes by which the executive branch provides information to the Congress and by which Congress determines to make information public. It is remarkable how little formal procedure or even clear precedent now exists.

Congressional committees requesting information from the executive branch sometimes receive it and sometimes do not. The Armed Services and Appropriations Committees generally get what they ask for, both because of their control of the budget and because tending to be friendly with the national security bureaucracy, they have not asserted any right to publish information which the executive departments prefer to be kept secret. Other committees, including foreign relations, have been less successful. The administration's January, 1976 decision to stop sending the CIA Daily Intelligence Digest to the Armed Services and Appropriations Committees — over the objections of the committees — suggests the degree to which the initiative remains with the executive branch and how that initiative has been used to keep information from the Congress.

The bill setting up a permanent intelligence committee in the Senate, as recommended by the Church committee, would require the intelligence agencies to keep the oversight committee fully and currently informed about their activities. (See the article on p. 11) Another provision of this bill would permit the intelligence committee to designate that certain activities — such as covert operations — require advance notification to the committee. Similar provisions are contained in the recommendations of the Pike committee. Combining both control over the appropriations and clearly legislated requirements that the committees be given not only all the information they specifically demand but also all the information they need to be fully and currently informed should give the committees the authority over information that they need. Any remaining difficulty could only result from a failure of the committee to press its rights.

The problem of public release poses more difficulties. The Pike committee draft legislation would give the proposed oversight committee the right to release any information in its possession. In the effort to formalize the relatively successful procedures which the Church committee evolved, the Senate committee draft went through numerous revisions on this question. The final draft requires advance notice of intended release, first to the intelligence agencies and then to the President. If the President objects to release he can ask the committee to refer the matter to the full Senate. The committee could refuse the request and proceed with publication, or it could choose to go to the Senate. The Senate in turn could either make a decision or refer the matter back to the committee.

This proposal, cumbersome as it sounds, appears to embody the appropriate constitutional principles. Each house of Congress and its committees are entitled to the information that they determine to be necessary to perform their constitutional functions. Each house can determine for itself what information in its possession should be made public. This power can and in most cases should be delegated to its committees. Information received in confidence from the executive branch should not be made public without giving the President and administration officials a full opportunity to explain their objections, but ultimately the decision must rest with each house of Congress.

Such a system would begin to restore the constitutional balance between Congress and the President. Equally important, because Congress has on the whole an interest in making information public — just as the executive branch has an interest in keeping it secret — such a system should lead to less secrecy and to healthy public debate on national security affairs.

President Ford in his February 18th message to Congress refused to accept such procedures, asserting that information provided to the Congress with his understanding that it be kept secret should not be made public without his consent. He asserted that release even by the affirmative vote of a single house of Congress would violate the constitutional separation of powers. If Congress were to accept such procedures it would mark the end of any meaningful congressional effort at oversight of the intelligence community.

Congressional Oversight: Real or Cosmetic?

A Report on Senate Hearings

BY CHRISTINE M. MARWICK AND BRUCE R. SMITH

Agreement that Oversight Is Needed

In late January and early February the Senate Government Operations Committee held nine days of hearings on devising a framework for congressional oversight of the intelligence agencies. For the most part, witnesses grouped into two general camps — those supporting the administration's goal of re-establishing consensus for intelligence decisions made within the executive branch, and those who hoped that congressional oversight could establish meaningful limits on the executive branch's power to determine covert programs by themselves.

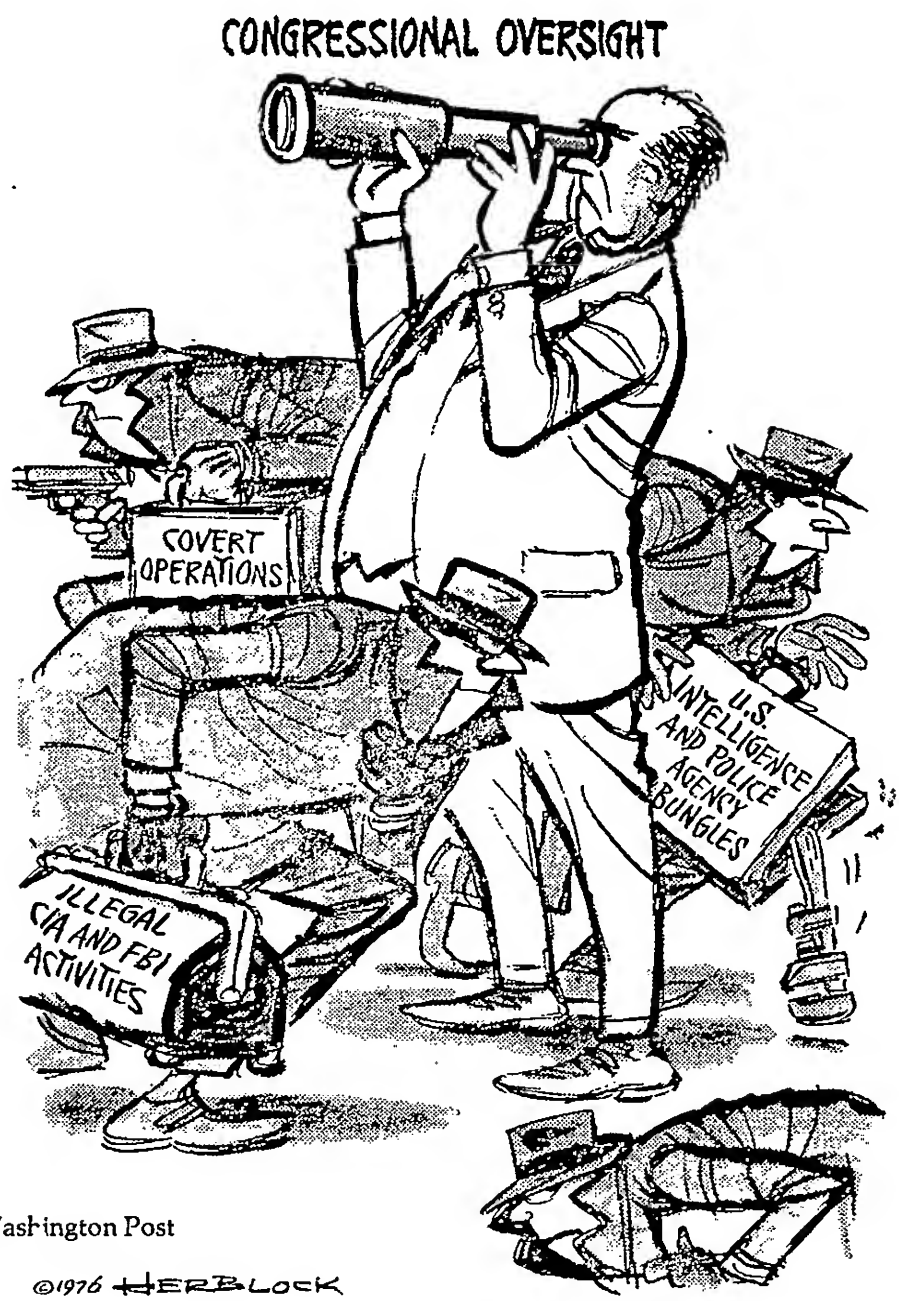
Both supporters and critics of the intelligence agencies recognized that the era of political consensus about covert operations has ended. Former CIA Director John McCone felt that the Cold War consensus should be redeveloped — the U.S. should use "moral, political, and economic strength to aid other nations against the threat of international communism." Clark Clifford, however, noted that covert action has arguably hurt the U.S. more than it has helped, and McGeorge Bundy felt that it has produced what he described as a

genuine crisis of confidence in the quality, integrity, and discipline of the intelligence community . . . that cannot be resolved without the development of a trusted, visible, and effective means of congressional oversight.

The Church Committee Recommendations

Much of the testimony before the Senate Government Operations Committee addressed the recommendations developed by the Church Committee on Intelligence Activities. This bill, S. 2893, constitutes the strongest position for congressional oversight so far put forward.

Briefly, the bill provides for a standing Senate Oversight Committee which would 1) have jurisdiction over all intelligence agencies other than tactical foreign military intelligence, 2) have jurisdictional authority over their budgets, 3) be fully and currently informed about intelligence activities, including prior notification of all "significant covert operations," 4) have authority to disclose information even over the objection of the President, with the Committee having



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the option of taking the issue to the Senate for a vote, and 5) consist of a nine-member rotating membership with six year terms and a fixed ratio of 5 majority/4 minority members.

We will consider some of the testimony on these recommendations.

Oversight: Real or Cosmetic?

Many witnesses were concerned with a history of generally ineffective congressional oversight; without continued public attention, oversight does not appear to function well. Sen. Mike Mansfield summarized these problems:

. . . . what would be counterproductive would be a committee cloaked with only apparent importance, . . . in the end so impotent that it would itself become a creature if not an active conspirator within the community over which it must exert scrutiny. Make it independent. Give it the tools and power to protect that independence. And above all, make certain that it responds to the Senate and to the Senate alone.

Witnesses supporting the intelligence community have been quick to point out they have had oversight committees in Congress, but these have not performed effectively. Ex-CIA Director Richard Helms felt Congress had not wanted to know about operations which might be "politically difficult" and failed to assume responsibility. The CIA, he said, should be able to ask for Senate support before they become embroiled in what will turn out to be an unpopular effort.

Other witnesses arguing in favor of continued

executive branch discretion in the intelligence field supported proposals that seem largely cosmetic — they felt that the post-Watergate atmosphere was enough to ensure that such a pattern of abuses could not occur again. They also seemed to feel that congressional limits on executive discretion might replace past abuses with a new system of more dangerous abuses by the legislature. Former Attorney General Nicholas Katzenbach presented this view:

Either the Executive must be given considerable discretion, or the Congress through an oversight committee will be tempted to substitute itself for the Executive in ways in which it should not, and which may even raise constitutional problems.

These witnesses left the impression that, far from suffering from the usual fate of congressional oversight committees — inattention — the committee and the Senate might well get carried away with their new incursion into executive authority. In polite phrases they drew a picture of an irresponsible Congress, ignorant of national security affairs, and blind to the vital importance of covert action. Sen. Baker found it necessary to note that "Patriotism and responsibility are not the monopoly of the Executive Branch."

Nevertheless, the executive did want oversight — a committee formed not to correct the threat of abuses but the leaking of information to the public. They wanted an oversight package which would reduce the present number of committees receiving intelligence information to one joint oversight committee and which would be constrained by severe sanctions against leaks.

Jurisdiction

Testimony included a considerable difference of opinion about the jurisdictional authority that should be given to a new oversight committee.

One question was whether the oversight functions which are presently divided among a number of committees should be transferred to a single, new oversight committee. Rep. Les Aspin recommended against a single oversight committee with such exclusive jurisdiction and warned that "if the intelligence committees should become captives, others will still have the opportunity to keep watch over the country."

Another question was which intelligence agencies the new committee should have jurisdiction over. It was suggested, for instance, that the new committee be limited to CIA and NSA, in order to avoid cutting into the jurisdiction of committees now concerned with the Justice Department (FBI) and DoD. Attorney General Levi argued that the FBI "is essentially a law enforcement agency," rather than an intelligence agency. Sen. Gaylord Nelson, on the other hand, felt that because the distinction between foreign and domestic intelligence was "relatively simple" and because domestic intelligence is not complicated by a problem of foreign policy leaks, domestic intelligence was the only realistic goal for a new committee's jurisdiction. Sen. Mansfield by contrast focused on the great gray area — an oversight committee must "accommodate an integrated perception of national intelligence," both foreign and domestic.

It was generally agreed that committee jurisdiction should include control of the intelligence budget. But there was a tendency to assume that budget control in itself would contain enough real leverage to ensure accountability. Having to justify their annual budget to Congress, Clifford thought, would "cause the Executive Branch to consider with greater care the undertaking of any covert activity."

Executive Secrecy vs. Congressional Access to Information

But it is not Congress's power of the purse that is seriously at issue; it is around the right of the Congress to information from the executive branch that the real conflicts begin to form. With all the shocking revelations on the one side and all the furor about leaks on the other, what is left is a loss of consensus about who can be trusted with keeping secrets. Sen. Frank Church summarized the dilemma:

We must recognize that at this time there is no agreement as to what a valid national security secret is, and that the Senate does not now have procedural means to make decisions concerning secret matters of national importance following the full processes laid out by the Constitution.

In the effort to rebuild confidence in the intelligence community, Bundy recommended leaning toward the side of openness.

But the intelligence community is instead leaning toward the other side. Both the CIA and FBI directors argued for providing only limited congressional access to information. Citing dangers to the confidentiality of informants, FBI Director Kelley recommended that the good of the country would be best served by "requiring the FBI director to be fully accountable to an oversight committee through sworn testimony" — a rephrasing of the old argument that the integrity alone of officials (J. Edgar Hoover notwithstanding) is enough to prevent new abuses of official power.

Others worried that keeping Congress fully and currently informed would violate executive privilege. Deputy Secretary of Defense Robert Ellsworth felt that although Congress could rely upon the executive to give it all the information it needed, it could not require the executive to keep it fully and currently informed:

Congress has not the power to subject the Executive Branch to its will any more than the Executive Branch may impose its unrestrained will upon the Congress.

Prior Notification and the Right to Release Information

The relationship between real committee power and access to information takes its clearest form on the issue of requiring prior notification to the oversight committee of intended covert action. As Dean Rusk noted, the problem is who is to determine who makes the decision if there's a disagreement.

Witnesses favoring continued executive branch discretion to initiate covert actions argued from the assumption that such operations are vital to the national security. Bundy saw that analysis as anachronistic:

> *I have the impression that a large part of the current tension between the Executive Branch and Congress derives from the Administration's failure to recognize that times have changed . . . . But the fact is that in 1976 it is quite simply wrong to suppose that there is any such animal as a large, unattributed, unadmitted operation.*

Katzenbach, with a pragmatic advocacy for such executive powers, suggested a moratorium on covert activities abroad "until we have achieved a better consensus." CIA Director William Colby, on the other hand found prior notification a "false issue" interfering with the President's constitutional rights.

Executive branch witnesses emphasized that prior notification of covert operations implies the threat of veto by disclosure and they were against a prior notification requirement. They favored reliance on the slower method of withholding funds in order to exercise control — but they did not clarify how this is to work for controlling operations already implemented.

Other witnesses faulted the executive branch's recommendations, which would exclude any substantial role for Congress in policy-making debate, including the right to inform the public about controversial "secret" wars. Given that Congress is the constitutional mechanism for declaring war, these witnesses were unable to accept the idea that undeclared war is the prerogative of the executive.

Structure of an Oversight Committee

The challenge in designing the structure of an oversight committee is to avoid the well-known fate of many such committees — cooption and inattention.

The Church committee recommended rotating 6-year memberships to encourage fresh viewpoints and ensure that no oversight committee members would be in a position to establish a decades-long client relationship with the overseen. Witnesses such as Sen. Barry Goldwater, however, criticized this as an assault on the expertise of seniority.

The Church bill's fixed ratio for majority/minority members was faulted for encouraging an artificial consensus. Sen. Cranston noted:

> *Whenever in the past we have disparaged dissent and demanded bipartisan support and agreement on foreign policy, we have robbed ourselves of this central advantage of dissent.*

Witnesses in favor of continued executive branch discretion supported a Joint Committee rather than a separate Senate committee. Secretary of State Kissinger stated "the best oversight is concentrated oversight," but went on to explain that "it would reduce the chance of leaks by limiting the number of people with access." Other arguments were that a joint committee would enjoy faster communication; the CIA and FBI directors complained that having many oversight committees absorbed too much agency time. From the other side, Mansfield advocated separate committees; each house of Congress "may arrive at differing conclusions on where to go from here in the context of its own constitutional responsibility." Church warned that in order to get approval from both houses for a joint oversight structure, it might be necessary to design a committee with watered-down powers; a Senate committee could reflect the wishes of the Senate.

Controlling the Intelligence Agencies

This then gives some idea of the range of opinion brought out in recent hearings on congressional oversight of the intelligence agencies.

The dilemma which the country now faces is whether the executive and legislative branches of government can work out together effective guarantees to prevent future abuses of power by government agencies which operate in secret. Next month's issue of *First Principles* will cover this problem in more depth by comparing three separate sets of recommendations for controlling the intelligence agencies — the recommendations of the House Select Committee on Intelligence, the President's executive order and legislative recommendations, and the recommendations of the American Civil Liberties Union.

Point of View: A Change in Mood

(continued from page 16)

congressional irresponsibility. The CIA and the Ford administration went all out to exploit both episodes and to stress that effective intelligence operations required secrecy. Suddenly, the focus had shifted from abuses to the importance of secrecy. A *Washington Post* reporter suggested that the shift was such that the outcome of the investigations might be not congressional oversight but an official secrets act.

At the hearings on congressional oversight held by the Senate Government Committee (see the report on p. 11), administration and former administration officials urged the creation of a small joint intelligence committee, operating in total secrecy, to replace the oversight now being performed by more than eight committees. The House Intelligence staff recommended that it be made a crime to leak information which could reveal the identity of a secret official of an intelligence organization.

Critics of the intelligence community suddenly found themselves on the defensive. Bellwether columnists were saying that the pendulum of the city's mood had swung too far and it was time to right the balance. The intelligence agencies were now under the control of honorable men; the press reported John Connolly would soon be brought back into government service to supervise foreign intelligence from a Presidential Board; and Messrs. Levi and Kelley assured us that the FBI was now under control.

Whether this switch in mood is temporary or permanent remains to be seen. There may still be enough momentum remaining from the old mood for the Senate, if not the House, to set up a permanent committee with effective powers. The Church committee report presents a careful statement of what went wrong and why, and hopefully also offers well thought-out proposals for reform. There are, no doubt, many hidden abuses, litigation may force more to light and add fresh energy to the momentum for reform.

But in the winter of the Bicentennial it is difficult for those seeking to bring the nation's intelligence agencies back under the Constitution to escape a mood of pessimism.

Point Of View

A Change in Mood

MORTON H. HALPERIN

Washington is a city of moods.

For more than a year the mood has pointed toward putting greater controls on the intelligence agencies. The capital had barely caught its breath from the Nixon resignation in August, 1974 when in December the *New York Times* ran a front page story by Seymour Hersh reporting a "massive domestic, illegal surveillance program" by the CIA. Already implicated in Watergate, the Huston plan, and warrantless wiretaps, the intelligence agencies were in a vulnerable position. Despite official denials the story would not go away.

Official Washington reacted in its characteristic fashion. The President appointed a commission, each house of Congress created a special committee, and, as a result, 1975 was the year of the revelation. We all learned, as Senator Philip Hart put it, that the most paranoid fears of our most cynical young people were true. The CIA did give drugs to people and they did die. Our letters, phone calls, telegrams, and even garbage were intercepted by government intelligence agencies. Citizens were subject not only to surveillance but to harassment — simply because the intelligence agencies did not sympathize with their political activities. And the CIA did plot to assassinate foreign leaders and to overthrow democratically-elected governments.

These revelations came out too fast to be fully absorbed or understood, but there developed a consensus in the capital that something had to be done, that such abuses could not be permitted to continue. Although they devoted most of their effort to investigating the scope of the abuses, the Church and Pike committees promised sweeping reform proposals. The administration also promised to institute some reforms and to propose others to the Congress. Nothing actually changed but there appeared to be a momentum gathering toward some combination of significant reforms.

As 1975 came to an end, the mood began to swing. There were two key episodes — the assassination of the CIA station chief in Athens was blamed indirectly on the mood generated by the investigations, and the leaking of the Pike Committee report was publicized as a signal example of

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Perhaps it is a universal truth that the loss of liberty at home is to be charged to provisions against danger, real or pretended, from abroad.

JAMES MADISON TO THOMAS JEFFERSON,
MAY 13, 1798